

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,

No. 55991-5-I

Respondent,

v.

UNPUBLISHED OPINION

LUIS E. DIAZ,

Appellant.

FILED: **July 24, 2006**

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PER CURIAM. — Luis Diaz was convicted of possession of methamphetamine with intent to deliver. The court imposed a sentence of 36 months: a standard range 12-month sentence for possession with intent to deliver, plus a 24-month sentence enhancement based on the jury's finding that the offense was committed within 1,000 feet of a school bus stop. Diaz challenges his sentence, arguing that the statute authorizing the School Bus Zone enhancement requires the enhancement to be served concurrently with, rather than consecutively to the underlying sentence. Additionally, Diaz argues the trial court erred in refusing to give his proposed constructive

possession jury instruction. We conclude that under the plain language of the statute, if the jury finds the offense is committed within 1,000 feet of a school bus stop, the school bus zone enhancement must be served consecutively to the standard range sentence. We also conclude the constructive possession jury instruction given by the court correctly and adequately defines “dominion and control” and allowed Diaz to argue his theory of the case. We affirm.

FACTS

On April 4, 2004, a Seattle police officer arrested George McMartin for possession of methamphetamine. In exchange for leniency, McMartin agreed to contact his drug dealer and arrange to purchase drugs so the police could arrest the dealer.

McMartin used a police officer’s cell phone to call and arrange to purchase methamphetamine. McMartin told the person who answered the cell phone that he needed a “teener,” a slang term for 1/16th of an ounce of methamphetamine. McMartin asked if the person could deliver the drugs to a parking lot at 15th Avenue, SW and Roxbury in West Seattle. A police officer listened to the call and heard McMartin speaking to a male with a Hispanic accent. About five minutes later, McMartin called again and asked for “Luis.” The Hispanic man talked to McMartin again. McMartin asked if he was on his way to the parking lot. The person told McMartin he was on his way and his friend, Greg, was driving him to the parking lot in a green pick-up truck.

Several minutes later, a green pick-up truck pulled into the parking lot and stopped. Greg Osborne was driving, and Diaz was in the passenger seat. Several

police officers surrounded the truck and observed Diaz reaching down under his seat as the officers approached. Diaz and Osborne were placed under arrest. Diaz had a Hispanic accent while Osborne did not have an accent. The police found a bundle of methamphetamine under the passenger seat. The cell phone McMartin called to arrange the purchase was on the seat of the cab of the truck. The police also found methamphetamine in the bed of the truck.

The State charged Diaz with possession of methamphetamine with intent to deliver within 1,000 feet of a school bus stop. A jury found him guilty as charged. Based on an offender score of 1, Diaz had a standard range of between 12 to 20 months of confinement. The court imposed a 12-month sentence, plus a 24-month School Bus Zone (SBZ) enhancement, for a total sentence of 36 months of confinement.

ANALYSIS

School Bus Zone Enhancement

Diaz contends the statute authorizing the imposition of the SBZ enhancement requires the 24-month enhancement to be served concurrently with, and not consecutively to, the underlying sentence.

The SBZ enhancement, RCW 9.94A.533(6), states: “[a]n additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605.”¹

The meaning of a statute is a question of law that an appellate court reviews de novo. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The court's goal is to determine and give effect to the legislature's intent. Id.

If the language is unambiguous, the court will give effect to that language and that language alone because we presume the legislature says what it means. State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). Clear and unambiguous statutory language is not subject to judicial construction. Hines v. Data Line Sys., Inc., 114 Wn.2d 127, 143, 787 P.2d 8 (1990); Bravo v. Dolsen Cos., 125 Wn.2d 745, 752, 888 P.2d 147 (1995) (quoting Krystad v. Lau, 65 Wn.2d 827, 844, 400 P.2d 72 (1965)).

Only if a statute is ambiguous do we examine extrinsic evidence of legislative intent or resort to canons of statutory construction. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); Burton v. Lehman, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005).

An undefined term in a statute will be given its usual and ordinary meaning, and the court may use a dictionary definition to determine the usual and ordinary meaning of the term. State v. Martin, 55 Wn. App. 275, 277, 776 P.2d 1383 (1989); State v. Anderson, 58 Wn. App. 107, 110-11, 791 P.2d 547 (1990). Statutory language is unambiguous when it is not susceptible to two or more interpretations. State v. Delgado, 148 Wn.2d 723, 726, 63 P.3d 792 (2003).

Diaz's argument that the 24-month enhancement is concurrent to the underlying

¹ Possession with intent to deliver methamphetamine is a ranked offense under RCW 69.50. RCW 69.50.401(a)(1)(ii); RCW 9.94A.518. And under RCW 69.50.435(a)(3), it is illegal to possess methamphetamine with intent to deliver within 1000 feet of a school bus stop.

sentence is contrary to the unambiguous language of the statute. The SBZ enhancement as defined by RCW 9.94A.533(6) is “**an additional**” twenty-four months “**added to** the standard sentence range.”² The statutory language explicitly provides that the 24-month SBZ enhancement is “added to,” or in other words consecutive to, the standard range sentence imposed. Diaz does not cite any cases which have interpreted the SBZ enhancement as running concurrently with the underlying sentence. During the 17 years that the SBZ enhancement legislation has been in effect, it has been consistently applied in accordance with the plain language of the statute as an additional 24-month period of confinement added to the sentence imposed. See State v. Silva-Baltazar, 125 Wn.2d 472, 478, 886 P.2d 138 (1994) (interpreting former RCW 9.94A.310(5), which is now RCW 9.94A.533(6), the court concluded the SBZ enhancement provision adds 24 months onto the presumptive sentence); State v. Lusby, 105 Wn. App. 257, 265-66, 18 P.3d 625 (2001) (citing legislative history that the SBZ enhancement statute was intended to impose additional penalties for drug activities conducted within certain localities to increase the maximum penalty imposed and add two years to the presumptive sentence); See also, State v. Johnson, 116 Wn. App. 851, 856, 68 P.3d 290 (2003); State v. Nunez-Martinez, 90 Wn. App. 250, 256, 951 P.2d 823 (1998); State v. Wimbs, 74 Wn. App. 511, 514, 874 P.2d 193 (1994); State v. Dobbins, 67 Wn. App. 15, 18-19, 834 P.2d 646 (1992).³

² (Emphasis added.)

³ Also, as the State points out, if the enhancement were applied in accordance with Diaz’s interpretation, it would defeat the policy behind the SBZ enhancement of increasing the penalty for drug trafficking in proximity to school children because in many cases, the enhancement would not increase a

Diaz urges this court to compare the SBZ enhancement with the language of the firearm enhancement provision in the same statute. Under the firearm enhancement provision in RCW 9.94A.533(3)(e), firearm enhancements “shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter.” But, as explained, we conclude the SBZ enhancement is unambiguous. Therefore, there is no need to inquire beyond the language of the statute and no need for judicial construction. Nevertheless, while the firearm enhancement uses the term “consecutive,” the language of the SBZ enhancement stating that the 24 months is “added to” the sentence, is equally clear.⁴

In the alternative, Diaz argues that the effect of the SBZ enhancement is to increase the high-end of the standard range by 24 months. Under this theory, Diaz contends that his standard range sentence of 12 to 20 months would be 12 to 44 months with the imposition of the SBZ enhancement. This argument is also contrary to the unambiguous language of the provision. Moreover, our courts have rejected the argument that the SBZ enhancement only increases the top-end of the standard range, stating that if the legislature intended this, it would have explicitly stated so. See State v. Williams, 70 Wn. App. 567, 571-573, 853 P.2d 1388 (1993). And while Diaz relies

defendant's sentence and in no case would it result in a 24-month increase.

⁴ Additionally, the firearm enhancement years provision was enacted as a part of the Hard Time for Crime Act by voter initiative in 1995, six after the SBZ enhancement was enacted, and was approved by the legislature as written. Even if the SBZ enhancement were ambiguous, the firearm enhancement provision would be of minimal value in deriving the legislature's intent when it enacted the SBZ enhancement provision six years earlier.

on the fact that the legislature recodified and amended the SBZ enhancement in 2000 replacing the term “presumptive sentence” with “standard sentence range,” this change does not affect the meaning of the statute. The legislature expressly confirmed that it did not intend any substantive change in its amendment. See RCW 9.94A.015 (the legislature “does not intend chapter 28, Laws of 2000 to make, and no provision of chapter 28 shall be construed as making, a substantive change in the sentencing reform act.”).

The unambiguous plain language of the SBZ enhancement provides for a 24-month enhancement to be added to the standard range sentence imposed for the underlying offence.⁵

Constructive Possession Jury Instruction

Diaz claims the trial court’s instruction to the jury defining constructive possession did not adequately and correctly state the applicable law and impaired his ability to present his theory of the case.

The trial court has considerable discretion regarding the wording of instructions necessary to present each litigant's theory fairly, and we review the trial court’s decision for an abuse of discretion. State v. Rehak, 67 Wn. App. 157, 165, 834 P.2d 651 (1992); State v. Castle, 86 Wn. App. 48, 62, 935 P.2d 656 (1997). Jury instructions are sufficient if they permit the party to argue his or her theory of the case, are not misleading, and when read as a whole, correctly inform the jury of the

⁵ Because there is no ambiguity in the language of the statute, the rule of lenity does not apply.

applicable law. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

The trial court gave the following instruction defining actual and constructive possession:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control does not have to be exclusive to establish constructive possession.

The trial court's instruction was based on Washington Pattern Jury Instructions (WPIC) 50.03, for use in drug cases where there is evidence of constructive possession sufficient to submit the issue to the jury. 11 Washington Pattern Jury Instructions: Criminal 50.03, at 640 (2d ed. 1994). The last sentence, explaining that dominion and control need not be exclusive, is optional under WPIC 50.03.

The court rejected Diaz's proposed instruction which was substantially the same, except it included an additional sentence stating that "mere proximity of the defendant to an alleged controlled substance is not sufficient evidence to establish constructive possession."

While more than mere proximity is necessary to establish constructive possession, State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990), this court has previously held that it is not error to omit the "mere proximity" language in the constructive possession instruction where the State did not rely on proximity alone to prove possession. Castle, 86 Wn. App. at 61-62. In Castle, police stopped the

defendant because of a faulty brake light. After arresting Castle on outstanding warrants, the police searched his car and uncovered a bag containing drug paraphernalia, a letter addressed to the defendant, a watch, and other items. Castle claimed his car had recently been stolen and the drug-related items were not his. On appeal, Castle argued that because the court refused to give his specific “mere proximity” instruction he was unable to pursue his defense of denial of constructive possession and unwitting possession. The court concluded that the standard instruction was “complete and accurate” and fully enabled the defendant to argue his theory that he did not have constructive possession of the contraband. Id. at 61. The court noted that the evidence established that Castle had control of the car when he was arrested and the evidence established that some of the items contained in the bag belonged to Castle. Therefore, the State “did not rely on mere proximity, nor was there a danger the jury would do so.” Id. at 62.

Likewise, Diaz argued that he was not the person with whom McMartin arranged the transaction and that any contact he had with the drugs was fleeting. The trial court’s constructive possession jury instruction did not prevent Diaz from presenting his defense. And, as in Castle, the State did not rely on mere proximity. The State’s case was based on the arrangements made with McMartin; on Diaz’s arrival in the truck described in the phone call at the prearranged location with the drugs requested by McMartin; and on the fact that Diaz hastily shoved the drugs under his seat when the police were approaching. The trial court did not abuse its discretion in giving the

standard WPIC constructive possession instruction without including the “mere proximity” language.

Conclusion

We affirm Diaz’s conviction for possession of methamphetamine with intent to deliver and the court’s decision to impose the 24-month SBZ enhancement to be served consecutively to his standard range 12-month sentence.

FOR THE COURT:

Schindler, ACF

Grosse, J

Cox, J.